**BEFORE THE APPEALS BOARD**
**FOR THE**
**KANSAS DIVISION OF WORKERS COMPENSATION**

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| **DON E. SUTTON** | ) | |
| Claimant | ) | |
| VS. | ) | |
| | ) | Docket No 183,710 |
| **NORLAND PLASTICS, INC.** | ) | |
| Respondent | ) | |
| AND | ) | |
| | ) | |
| **GRANITE STATE INSURANCE CO.** | ) | |
| Insurance Carrier | ) | |
| AND | ) | |
| | ) | |
| **KANSAS WORKERS COMPENSATION FUND** | ) | |

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| **DON E. SUTTON** | ) | |
| Claimant | ) | |
| VS. | ) | |
| | ) | Docket No 223,862 |
| **TELEFLEX, INC.** | ) | |
| Respondent | ) | |
| AND | ) | |
| | ) | |
| **CONTINENTAL NATL AMER GROUP** | ) | |
| Insurance Carrier | ) | |

## ORDER

Respondent Teleflex, Inc. and its insurance carrier Continental National American Group appeal from the March 27, 1998, preliminary hearing Order entered by Administrative Law Judge Jon L. Frobish.

## ISSUES

The Administrative Law Judge granted claimant's request for medical benefits finding claimant sustained a new accidental injury under Docket No. 223,862. As the Workers Compensation Fund (Fund) was impleaded under Docket No. 183,710 and the Administrative Law Judge found a date of accident in Docket No. 223,862 that was after July 1, 1994, the Fund was dismissed. Respondent appeals those findings and orders. The specific issues raised by respondent on review are:

(1) Whether claimant suffered an accidental injury that arose out of and in the course of claimant's employment in Docket No. 223,862.

(2) Whether claimant's current complaints are the symptoms of degenerative disease which is a residual of the injury which is the subject of the running award in Docket No. 183,710.

(3) Whether claimant suffered a temporary aggravation of a previous shoulder injury or, if claimant suffered a new injury, whether notice was timely given.

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

### Findings of Fact

(1) Claimant initially injured his right shoulder in February, 1993 while working for respondent. He underwent surgery on February 24, 1994, consisting of a distal clavicle resection for the acromioclavicular joint and rotator cuff repair.

(2) Claimant was released to return to work on April 29, 1994, with restrictions against arm movement above mid chest level or more than 12 to 18 inches in front of him. At that time, claimant indicated that he was still experiencing "popping" at times in his shoulder. Although claimant was released, he was to continue with physical therapy.

(3) On May 12 and 13, 1994, claimant aggravated or reinjured his shoulder working on the same machine he had worked on prior to his injury. Dr. Paul D. Lesko determined that claimant had not damaged the rotator cuff repair and instructed claimant to follow his restrictions relating to keeping his right elbow at his side.

(4) Dr. Lesko modified claimant's restrictions on May 19, 1994, and again on July 22, 1994, to limit overhead work to no more than 18 inches, to reach no more than 18 inches from his chest, and limit pushing and pulling. These restrictions were made permanent and claimant was released from Dr. Lesko's care on August 29, 1994. At that time claimant was reporting that he still had some popping in his shoulder and that his shoulder would hurt after working two to three hours reaching up into a plastic mold machine.

(5) Claimant again aggravated or reinjured his right shoulder on November 21, 1994. He was treated with steroid injection and Dr. Lesko imposed additional work restrictions. Claimant was able to continue working for respondent within those restrictions. On December 12, 1995, he entered into an agreed running award whereby he settled his claims for accidents on February 1993 through June 1993 and May 12, 1994, and May 13, 1994, and each and every working day thereafter based upon a 5 percent permanent partial disability to the body as a whole. The same agreed award also settled a second claim under the same docket number for accidental injuries to the right shoulder sustained on or about June 29, 1993. It was agreed that the Workers Compensation Fund would be liable for disability and medical benefits beginning with the June 29, 1993, accident date.

(6) On or about March 9, 1997, claimant was working with two different plastic molds in respondent's factory. The first two days he did this work, he did not have any problems. The

third day, however, claimant attempted but was unable to do the work because of pain in his shoulder. Claimant described these jobs as requiring him to clip a plastic gate with a pair of plier-like tools. Claimant went to his supervisor and told him that he could not do the work because of shoulder pain and that he believed the work exceeded his restrictions.

(7) When claimant sought medical treatment through respondent, he initially sought benefits pursuant to the running award in his earlier claim because the pain was similar to, although more severe than, his earlier injuries. Claimant did not file a claim for a new injury until July 2, 1997. That claim was assigned Docket No. 223,862. It initially alleged injury on or about March 11, 1997, but was subsequently amended to include each and every working day thereafter.

(8) Claimant was examined by physiatrist Dr. Pedro Murati who on August 14, 1997, opined as follows:

> IMPRESSION:
> 1. Status post right distal clavicle resection with right rotator cuff repair.
> 2. Aggravation of the right shoulder injury in March of 1997.
>
> PLAN/ RECOMMENDATIONS:
> 1. I recommend the patient have an MRI of the right shoulder to rule out a tear.
> 2. I recommend he receive a corticosteroid injection to the right shoulder.
> 3. I recommend he continue with Dr. Lesko's permanent restrictions.
> 4. He may benefit from a short course of physical therapy to the right shoulder.

(9) Claimant was also examined by orthopedic surgeon Dr. Robert A. Rawcliffe, Jr. on November 11, 1997. His opinion was:

> CONCLUSIONS: [p]atient developed a rotator cuff tear, as well as chondromalacia involving the glenohumeral joint as a result of repetitive use of his right shoulder while employed by the Norland Plastics Company. This has been appropriately treated by rotator cuff repair and acromioplasty. The patient has persistent symptoms, including crepitus and weakness in flexion and abduction of the shoulder and pain with all shoulder motions. . . . It is my opinion that any injury occurring in March of 1997 was an aggravation of the previous injuries occurring in February and June of 1993.

Dr. Rawcliffe went on to recommend restrictions similar to those imposed by Dr. Lesko:

> The patient should be restricted from any work requiring lifting above mid chest height and should not lift in access of 20 pounds using his right hand alone on occasion, and 10 pounds more frequently. He should not be required to do

> repetitive pushing, pulling, or lifting using his right upper extremity, and should not do any overhead work requiring abduction or elevation of the shoulders.

(10) Dr. Bernard Poole examined claimant on January 7, 1998. He diagnosed:

> . . . recurrent or persistent acromioclavicular joint spur formation and degeneration, persistent subacromial degeneration and acromial spur formation with impingement of the rotator cuff and possibly a small tear of the supraspinatus tendon.
>
> I would recommend that this patient have an MRI of the shoulder for further investigation. Based on this clinical exam, it would seem that the status of the shoulder is one of a degenerative, rather than a traumatic process.

(11) Claimant continues to work for respondent doing the same or similar work that he has always done, although he is no longer required to do the clipping job that caused his March 1997 aggravation. Claimant testified that his shoulder has hurt essentially all the time since November 1994. Although the pain he experienced in March 1997 was similar to his previous injuries, claimant described the pain from his most recent aggravation as more intense.

## Conclusions of Law

The Appeals Board finds claimant has sustained a new accidental injury that arose out of and in the course of his employment with respondent. A problem arises, however, when attempting to affix a date to this new accident. The Court of Appeals attempted to establish a bright line rule whereby in repetitive trauma cases the date of accident would be the last day worked by the claimant. Berry v. Boeing Military Airplanes, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994). Problems with the "last day of work" rule soon became apparent. For example, not every injured worker has to leave work because of his injuries. The Court of Appeals addressed the date of accident problem again in Condon v. Boeing Co., 21 Kan. App. 2d 580, 903 P.2d 775 (1995). There claimant left work for reasons unrelated to her injury. Instead of applying the last day worked rule, the Court in Condon found claimant's date of accident to have been earlier than the last day worked. The Court did not, however, specifically adopt as the date of accident the date when the claimant was given work restrictions. Actually, in Condon, the claimant developed new symptoms in a different part of her body after she was given restrictions and after she had been transferred to a different job position. Those new symptoms were later determined to be indicative of a new or additional injury that also became a part of her workers compensation claim. No new restrictions were imposed, however, before the date the Court adopted as the date of accident. Thus, the Condon case actually stands more for a "date of onset of symptoms" or a "date of seeking medical treatment" rule than it does for a "date of restrictions" rule.[1]

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[1] See also Durham v. Cessna Aircraft Company, 24 Kan. App.2d 334, 945 P.2d 8 (1997), where the Court of Appeals utilized the last day claimant worked prior to undergoing surgery as the date of accident. The Court described its holding as following the last day worked rule from Berry. But this would also be consistent with a date of restrictions rule because, following his recovery, claimant returned to work for the respondent at an accommodated position that was intended to prevent claimant from sustaining further injuries.

But the Court strictly applied a date of restrictions rule for determining the date of injury in Alberty v. Excel Corporation, 24 Kan. App.2d 678, 851 P.2d 967, *rev. denied* 264 Kan. __ (1998). An interesting twist in Alberty was that the Court rejected the Board's analysis that because claimant's condition continued to worsen after her restrictions were imposed and while she was working in her first accommodated position, the date of accident should be the last day claimant worked in that position before being reassigned to another accommodated position which did not worsen her condition. The Court found that date of accident to be inconsistent with Condon and adopted the rule that the date of accident in a repetitive trauma case is "the last day of work before work restrictions were implemented."[2] In Condon, however, there was expert medical opinion testimony that the work the claimant performed after a certain date did not worsen the claimant's condition. Unlike Condon, that was not what the evidence established in Alberty. To the contrary, in Alberty, the claimant's condition continued to worsen in the first accommodated job. Nevertheless, the date restrictions are first imposed is apparently the rule to be followed in cases where the claimant does not leave work due to the injury, regardless of whether the claimant's condition worsens and the restrictions are later deemed to be inappropriate. This aspect of the Alberty decision aside, what appears to be the connecting thread between the recent trend in repetitive trauma cases is a variation of the last injurious exposure rule previously followed in occupational disease cases. (The similarity between repetitive trauma injuries and occupational diseases was not lost upon the Court in Berry when it described one such condition, carpal tunnel syndrome, as "neither fish nor fowl.") The claimant's last injurious exposure to repetitive or cumulative trauma is when he or she leaves work. But when the claimant does not leave work or leaves work for a reason other than the injury, then the last injurious exposure is when the claimant's restrictions are implemented and/or the job changes or job accommodations are made by the employer to prevent further injury.

In the case at bar, claimant was given permanent restrictions and his job duties were modified somewhat to accommodate those restrictions. Claimant, nevertheless continued to be symptomatic. In March 1997, claimant was performing a job that may not have been within his restrictions. His symptoms worsened and he may have suffered additional permanent injury. But claimant has continued working for respondent. Therefore, under the Condon and Alberty line of cases, if claimant has a new injury, the date of accident will be the date claimant leaves work due to his injury or when new or additional restrictions are imposed by a physician and implemented by respondent by making further job accommodations. Under the facts presented, that date has yet to occur. Claimant is continuing to work on the same machines that aggravated his condition "each and every working day" through to the date of the preliminary

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[2] Actually, in Alberty, although the treating physician gave the claimant work restrictions on the date selected by the Court as the date of accident, those restrictions were not "implemented" at work because, for some time thereafter, claimant continued to grip and pull meat. Also, because claimant's condition continued to worsen and she developed new symptoms in her shoulder after March 31, 1992, the physician later gave claimant additional restrictions regarding the use of her right arm. This writer would submit that the date of accident found by the Appeals Board in Alberty was "the date restrictions were implemented." The Court of Appeals just disagreed with the Board's finding as to when that occurred.

hearing. Therefore, notice is not a problem. Nevertheless, claimant is clearly in need of additional treatment and cannot wait upon the occurrence of some legal fiction to establish a date of accident in order to obtain those benefits.

It must be remembered that the bright line rule first announced in Berry was only intended to establish a single date of accident for the purpose of computing the award. Condon extended the legal fiction of a single accident date to determine what law would apply to the claim. This does not mean that the injury in fact occurred on only one day. By definition, a repetitive trauma injury occurs over a period of time. The fact that we are dealing with a series of accidents cannot be lost sight of when determining a single "date of accident" for legal purposes in applying the Workers Compensation Act.

The Appeals Board finds that claimant has suffered a new and distinct injury that is an aggravation of his preexisting condition and that benefits should be awarded under the new claim, which is Docket No. 223,862.[3]

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the preliminary hearing Order by Administrative Law Judge Jon L. Frobish of March 27, 1998, should be, and is hereby, affirmed.

**IT IS SO ORDERED.**

Dated this ____ day of June 1998.

BOARD MEMBER

c: Dale V. Slape, Wichita, KS
D. Steven Marsh, Wichita, KS
Kim R. Martens, Wichita, KS
Cortland Q. Clotfelter, Wichita, KS
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Director

[3] This finding affirms the Administrative Law Judge. But the Administrative Law Judge went on to release the Workers Compensation Fund. Because the finding of a new accident is a preliminary finding based upon an incomplete record, however, the Fund would fail to participate further in these consolidated proceedings at its own peril. For example, were claimant's aggravation ultimately found to be a temporary symptomatic flare-up caused by him exceeding his original restrictions, and if he continues working his regular job with no new permanent restrictions, then this claim could be found compensable under the prior docketed claim No. 183,710.